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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1035

RUDY BARTHEL,

Petitioner,

vs.

MARGARETE STAMM, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CHRISTIAN STAMM, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT

Petitioner herein, Rudy Barthel, by his counsel prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review the record and judgment entered by that court in the above case, No. 10993 in said court, entered on November 10, 1944, and upon which a motion for rehearing was denied on December 15, 1944, same being a final judgment. See *Barthel* v. *Stamm*, 145 F. 2d 487.

Summary Statement of Matter Involved

On November 25, 1940, respondent, Margarete Stamm, as executrix of the last will and testament of Christian Stamm, deceased, her husband, alleging that she was a citi-

zen of the State of New Jersey, sued petitioner, Rudy Barthel, in the United States District Court for the Northern District of Georgia at Atlanta, alleging in three counts that defendant borrowed from Christian Stamm, on November 30, 1934, the principal sum of $10,000; on April 24, 1935, the principal sum of $3,600, and on April 24, 1935, the principal sum of $1,200, each evidenced by a check for such amount and bearing said dates, respectively, payable to the defendant and endorsed and cashed by him, which represent a debt due to petitioner, and prayed for a judgment for such amounts with interest at 6% from said dates, copies of the checks and endorsement being attached as exhibits, and being drawn by Christian Stamm. This is a simple suit on an implied promise to repay money had and received, which was filed more than four years after any cause of action thereon had accrued, this being the statutory period of limitation in Georgia for such an action.[1] Defendant answered pleading the statute of limitations and denying the material allegations of the petition, putting plaintiff on proof of the jurisdictional allegation of diverse citizenship. Defendant also filed a motion for a judgment on his plea of the statute of limitations, which was overruled upon the theory, erroneously it is contended, that a demand was necessary to start the running of the statute of limitations, which was not shown by the pleadings. This ruling was assigned as error. Thereafter, and *more than six years after any cause of action accrued*, plaintiff on December 6, 1941, filed an amendment to the petition attaching two letters from defendant to Christian Stamm (who will hereinafter be referred to as "deceased"). The first letter, dated November 28, 1934, acknowledges receiving $10,000; pro-

[1] Ga. Code § 3-706 provides: "All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, shall be brought within four years after the right of action shall have accrued."

vides for 7½% interest; for maintenance of a 2.50 exchange rate on American dollars and for 2½% extra compensation, annually, *the amendment not alleging that such letter constitutes any promise to pay;* the second letter, dated April 20, 1935 (alleged to constitute a promise to pay $4,800 represented by the two checks dated April 24, 1935, aggregating that amount), acknowledges having received $4,800 on condition that defendant pay it back with 20% profit in two or three months, and agrees to maintain an exchange rate of 2.50 on German marks. In this amendment plaintiffs asks for a summary judgment for "the full amount sued for in the original action brought", which was the amount of the checks with 6% interest from their respective dates.

Defendant filed an answer to this amendment in which he denied the material allegations thereof and again pleaded the statute of limitations, whether the cause of action accrued as originally alleged or as appearing by said amendment,[2] and answered further that said sums were invested by defendant at the instance of deceased, in furs bought in America and shipped to Germany and there sold by defendant under an agreement between them that defendant, would, out of the proceeds of the sale, return to deceased the amount invested plus 10% profit on each turnover; that shortly after the last such investment (of $4,800) restrictions were imposed by the German government on foreign exchange and thereafter it was impossible to get money out of Germany, which deceased well knew and stated that he never expected to get his money back.

The record shows without dispute and by statements of plaintiff's counsel (R. 20-21) that shortly before the filing

[2] Ga. Code § 3-705 provides: "All actions upon promissory notes, bills of exchange, or other simple contracts in writing shall be brought within six years after the same shall have become due and payable."

of the amendment he wrote his client asking if she had anything contemporaneous with the checks indicating a promise, and thereupon the letters were "discovered" and pleaded by the amendment, thus disclosing that the *existence* of the letters were not known at the time the suit was filed.

Upon the trial the issues were (1) the jurisdiction of the court, depending upon proof of the citizenship of plaintiff in New Jersey; (2) whether the claims were barred by the statute of limitations; (3) whether the amendment added a new and distinct cause of action, and even if sufficient to show a contract in writing, whether it was filed too late and was barred by the six-year statute of limitations, and whether being a new and distinct cause of action it could relate back to the time of the filing of the petition to relieve it from the bar of the statute, and (4) that the amounts advanced were not loans but were investments made by deceased in defendant's fur business.

The only evidence to show the alleged New Jersey citizenship of plaintiff or citizenship in any particular state was a certificate of citizenship issued by the clerk of the Court of Common Pleas of Bergen County, N. J., under seal of that court, not purporting to contain a certified copy of the proceedings and order of the court admitting her to citizenship, nor any part of that record, but merely the clerk's statement, mere conclusion or hearsay, that plaintiff had complied with the law in relation to naturalization and that "it was ordered by said court that she be admitted a citizen of the United States of America." The court held the defendant incompetent to testify to his agreement with deceased that the money advanced was not a debt but an investment in defendant's fur business for an agreed profit and that the writings offered were given on condition that they were to be used only in the event of defendant's death, basing its ruling on Georgia

Code § 38-1603 (1)[3] providing that in a suit instituted by the personal representative of a deceased person the opposite party shall not be admitted to testify in his own favor against the deceased person as to transactions or communications between them. Plaintiff had taken defendant's testimony by depositions which were introduced in evidence to make out plaintiff's case, with respect to the very letters and checks involved in the transactions in question, and the court failed to give application to Georgia Code § 38-1603 (6)[4] creating an exception to this rule where such personal representative has introduced an interested witness who has testified as to such transactions the surviving party may be examined with reference to them, and cases construing same.

The certificate of naturalization was admitted over defendant's objection (R. 48) that it was not proper proof of naturalization, not being a certified copy of the record and proceedings for naturalization, it not appearing to be the petition for naturalization nor the order granting naturalization but a mere statement by the clerk, a conclusion on his part, as to what transpired in the proceeding, in the form of his certificate, but not containing the judgment of the court.

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[3] Ga. Code § 38-1603 (1) provides: "Where any suit shall be instituted by * * * the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the * * * deceased person as to transactions or communications with such * * * deceased person whether such transactions or communications were had by such * * * deceased person with the party testifying or with any other person."

[4] Ga. Code § 38-1603 (6) provides: "In all cases where the personal representative of the deceased * * * party has introduced a witness interested in the event of a suit, who has testified as to transactions or communications on the part of the surviving * * * party with a deceased * * * party * * *, the surviving party * * * may be examined in reference to such facts testified to by said witness."

Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138 (2) (33 S. E. 945). Shipp v. Davis, 78 Ga. 201 (1, 2) (2 S. E. 549).

The letters of defendant were admitted over objection by defendant (R. 18, 19, 21, 22) that they were evidence of a new, separate and distinct cause of action from the cause of action sued on, which is alleged as a debt evidenced by cancelled checks showing defendant's receipt of the money; that the cause of action sued on is barred by the statute of limitations; that the original suit alleged an indebtedness evidenced by paid checks, and the letters, it is contended, constitute a promise to pay that indebtedness, the suit being *in assumpsit*, and the letters are offered as a specific written contract, a different cause of action, and if offered as a renewal of the original implied promise they would still be subject to the statute of limitations applicable to the original suit which was four years; that the letter of April 20 shows on its face that it did not refer to an indebtedness alleged to have been made April 24, four days later; that the letter of April 20, 1935, shows that the purported debt was due not later than three months after its date and the suit not having been filed for more than four years thereafter the claim is barred by the statute of limitations; (R. 22) that the letter of November 28, 1934, shows on its face that it is usurious and not the same debt and not the same rate of interest as the obligations sued on and that it is void as to interest under the applicable laws of New Jersey.[5] The same objections were made to defendant's translations of the letters (R. 24), except that it was admitted the translation by defendant was a correct translation.

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[5] Rev. Stat. of New Jersey § 31:1-1 provides that no one shall take more than 6% interest. § 31:1-3 provides that in all actions to enforce contracts for the payment of money on which a higher rate of interest shall be reserved or taken than is allowed by the law of the place where the contract was made or is to be performed, the amount actually lent, without interest or cost of suit, may be recovered, and no more.

Jurisdiction

The jurisdiction of the court is invoked under Section 240 of the Judicial Code as amended by the Act of Feb. 13, 1925 (28 U. S. C. A. Sec. 347). The following cases are believed to sustain the jurisdiction:

Freeman v. *Bee Machine Co.*, 319 U. S. 448;
Mercoid Corporation v. *Mid-Continent Co.*, 320 U. S. 661;
Sartor v. *Arkansas Natural Gas Corporation*, 321 U. S. 620.

Questions Presented

The questions involved under the facts presented are:

1. Under Rule 15 (c) Federal Rules of Civil Procedure,[6] where suit *in assumpsit* on an implied promise to repay borrowed money with 6% interest is filed after the Georgia four year statute of limitations has run on such an action and such plea has been interposed, and after the Georgia six year statute of limitations on a simple contract in writing, not under seal, has run, an amendment is filed setting up writings dated a few days prior to the dates of the respective checks, acknowledging receipt of the amounts of such checks, and providing for various obligations such as the payment of 20% profit; the payment of 7½% interest; the maintenance of a foreign exchange rate of 2.50 between American dollars and German marks, and as to the payment of 2½% extra compensation, to which amendment a plea of the statute of limitations is filed,

[6] Rule 15 (c) Federal Rules of Civil Procedure provides: "Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." 28 U. S. C. A. fol. Sec. 723(c).

and it appears that the existence of the writings was not known when suit was filed and that the writings were not originally sued on, nor was there any pretense of suing on any written express contract until the offering of the amendment after the statute of limitations had been pleaded to the suit as filed *in assumpsit*, and after the statute of limitations had run on a simple contract in writing, not under seal, and notwithstanding the usury shown in the face of such writings the suit as amended still prays for interest thereon, can such an amendment relate back to the time of filing of the suit so as to avoid the bar of the statute of limitations?

Involved in this question are two others:

2. Did not such amendment set forth a new and distinct cause of action?

3. If such an application be given to Rule 15 (c) Federal Rules of Civil Procedure, in view of the fact that under the decisions of the highest appellate courts of the State of Georgia, and of the United States Supreme Court, and which is conceded by the Circuit Court of Appeals here, a defense of the statute of limitations is a *substantive* right, would it not be

(a) in violation of the enabling act under which the Federal Rules of Civil Procedure were formulated,[7] which provides that "said rules shall neither abridge, enlarge or modify the substantive rights of any litigant" and

(b) an unconstitutional application of such rule to hold it as being merely procedural, thus depriving defendant of a vested defense in violation of the due process clause as set forth in the Fifth and Fourteenth Amendments to the Con-

[7] Act of June 19, 1934, c. 651, § 1, (48 Stat. 1064), U. S. C. A. Title 28, §§ 723b, 723c.

stitution of the United States, providing that no person shall be "deprived of life, liberty, or property, without due process of law"?

4. Is a county clerk's certificate of citizenship proof of such citizenship in a judicial proceeding in which such citizenship is jurisdictional, where such certificate contans no part of the record of the citizenship proceeding, but only the clerk's statement that the court ordered that plaintiff be admitted a citizen, in the absence of any statute providing for the admission of such a certificate as evidence of citizenship in judicial proceedings?

5. Is testimony of a defendant, relating to transactions with a deceased person whose administrator is plaintiff, incompetent, after plaintiff has introduced the testimony of defendant relating to such transactions, under the exception provided by Georgia Code § 38-1603 (6)? (See note 4 *supra*.)

6. Did the court err in refusing to sustain defendant's motion for judgment on his plea of the statute of limitations, made before the filing of an amendment to the petition, setting up a claim based upon an implied promise to pay, already barred by the Georgia four year statute of limitations applicable thereto, such ruling being based on the fact that the record did not show a demand for payment to start the running of the statute of limitations, whereas under the law of Georgia the statute began to run thereon immediately?

Reasons for Granting the Writ

This case presents new questions of nation wide importance concerning a construction of Rule 15 (c) of the Federal Rules of Civil Procedure, which would deprive a litigant of the substantive right to assert a defense based upon a State statute of limitations.

1. The Circuit Court of Appeals for the Fifth Circuit has in this case rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter in that:

(a) The Circuit Court of Appeals for the Second Circuit has held that the *petition* must have shown that the pleader did *know*, and attempted to state, some definite transaction which he attempted to set out, and that inadvertent failure to accomplish what was actually intended in this regard will now be ground for amendment under Rule 15 (c), but failure to plead the pertinent facts adequately *merely because they are not known*, will have the same result as before,[8] whereas in the case under consideration it was shown by plaintiff's own counsel[9] that the writings pleaded by amendment were not even known to be in existence when the original petition was filed, yet the Circuit Court of Appeals for the Fifth Circuit held that under Rule 15 (c) the amendment related back to the filing of the petition in the face of the plea of the statute of limitations, and notwithstanding the claim originally sued on was an implied promise with no suggestion of any written contract. Said rulings are wholly inconsistent and involve an important question frequently recurring which has not been and should be finally determined by this Court to avoid present confusion.

(b) The Circuit Courts of Appeals for the Ninth and Tenth Circuits have held that Rule 15 (c) was not applicable when the amendment introduces a different cause of action, even though it arose out of the same transaction,[10] whereas the Circuit Court of Appeals for the Fifth Circuit, without disputing defendant's contention that the writings, if sued

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[8] Glint Factors Inc. v. Schnapp, (1942 C. C. A. 2d, N. Y.) 126 Fed. 2d 207 (3).

[9] R. 28, 27.

[10] L. E. Whitham Construction Co. v. Remer (C. C. A. 10), 108 Fed. 2d 371; Schram v. Poole (C. C. A. 9), 97 Fed. 2d 566, (14) 572.

on, constituted a different cause of action from that originally asserted, and conceding that Georgia limitation statutes control, and further recognizing the Georgia rule [11] that a new and distinct cause of action introduced by amendment cannot succeed if barred at the time of the amendment, nevertheless held that a "bettering or amplification of the case first sought to be alleged will relate back to the filing of the suit"; that these written acknowledgments and obligations to repay did not alter the original claim, but served "only to show that not only were the checks passed, but contemporaneously and as a part of the transactions these written obligations were delivered", and held that "under Rule 15 (c) the amendment relates to the date of the original suit * * * The six year limitation applicable to simple contracts in writing controls and the suit was filed in time." This ruling, in the face of repeated Georgia decisions holding that such an amendment created a new and different cause of action, overlooks the basic fact that although the writings might have been admissible to explain or amplify the terms of the implied promise originally sued on, or might have been additional evidence to that of the paid checks, of the receipt of the money, and of the resulting implied promise to repay it, *while adhering to that cause of action* and with no purpose of counting on the writings as a different cause of action, as was the case in *Tumlin* v. *Bass Furnace Co.*, 93 Ga. 594 (2) (20 S. E. 44), yet they could not be set up as a different cause of action to give plaintiff the benefit of a six year statute of limitations instead of the four year statute applicable to the suit as

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[11] Ga. Code § 81-1303 provides: "No amendment adding a new and distinct cause of action * * * shall be allowed unless expressly provided for by law."

Ayers v. Daly, 56 Ga. 120 (1);

Graham v. Jones, 39 Ga. App. 610 (147 S. E. 902);

Pacmelee v. Savannah &c Ry. 78 Ga. 239 (1) (2 S. E. 686).

filed, nor in that event could such amendment relate back, being filed after the expiration of six years from the accrual of that cause of action. Simply stated, if the amendment did not change the original cause of action, then it necessarily *remained an action on an implied contract, which was still barred by the four year statute.*

(c) The Circuit Court of Appeals for the Eighth Circuit has held that the *allegations* of the original petition must have been sufficiently specific to enable the court to determine whether the amendment relates to the same cause of action,[12] whereas in the case sub judice the court stated that "these writings (pleaded by amendment) are dated two or three days before the checks, but agree with the checks as to amounts, and the *evidence* (not the pleadings) leaves no doubt that they refer to the same transactions as the checks do." The holdings of these two Circuit Courts are wholly inconsistent and this Court should reconcile them and state the rule which should be followed.

2. The Circuit Court of Appeals for the Eighth Circuit[13] as well as the Supreme Court of Georgia[14] have held that there is no statute authorizing clerks of court to issue certificates of citizenship, and that such a certificate which does not purport to be a transcript of the record is not proper evidence of naturalization, whereas the Circuit Court of Appeals for the Fifth Circuit has here held directly to the contrary in these words: "The certified record was admissible as evidence, and *prima facie* shows plaintiff's naturalization."

3. The Fifth Circuit Court of Appeals has rendered herein a decision on an important question of local law,

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[12] Hovland v. Farmers State Bank, (C. C. A. 8th) 10 Fed. 2d 478.

[13] Dolan v. United States (C. C. A. 8th) 133 Fed. 440, 449.

[14] Miller v. Reinhart, 18 Ga. 239.

in a way probably in conflict with applicable local decisions, in that under Georgia decisions the statute of limitations is a statute of repose, affording defendant a substantive right, which when it once accrues cannot constitutionally be taken away from him,[15] and the enabling statute under which the Federal Rules of Civil Procedure were formulated, specifically provides that said rules shall not "abridge * * * the substantive rights of any litigant",[16] whereas the Fifth Circuit Court of Appeals has held herein that Rule 15 (c) is applicable "for these things are procedural."

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[15] McWhorter v. Cheney, 121 Ga., 541, 547, (49 S. E. 603). Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 390.

[16] Sec. 1, 48 Stat. 1064 (28 U. S. C. A. Sec. 723(b).

[17] Washington-Southern Navigation Co., v. Baltimore and Philadelphia Steamboat Co., 163 U. S. 629 (2) holds: "No rule of court can enlarge or restrict the jurisdiction of the court, nor can it abrogate or modify the substantive law."

SUPPORTING BRIEF

The defense of the statute of limitations is a matter of substantive right.

The Circuit Court of Appeals in the instant case concedes the correctness of this position, in these words: "We agree that limitation is a matter of substance rather than of procedure" and assumes that "the Georgia decisions on the effect of an amendment are as asserted", that is that an amendment cannot add a new cause of action, and an amendment setting up matter barred by the statute of limitations when pleaded, will not relate back to the filing of the petition.

Riddlesbarger v. *Hartford Fire Insurance Co.*, 74 U. S. 386;
United States v. *Wilder*, 80 U. S. 254;
United States v. *Oregon Lumber Co.*, 260 U. S. 290, 299;
United States v. *Sherwood*, 312 U. S. 584, 589;
Clementson v. *Williamson*, 12 U. S. 72, 74;
McWhorter v. *Cheney*, 121 Ga. 541, 547 (49 S. E. 603);
Wood on Limitation, 4th Ed., Vol. 1, p. 55, Sec. 11b.

The enabling act under which the Federal Rules of Civil procedure were formulated provides that "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." [18]

The "suspension" of the statute of limitations by the filing of an action and the relation back of an amendment "which amplifies and further explains the transaction out of which the claim arises", even under Rule 15 (c), is not applicable where a plea of the statute of limitations has intervened, and "the courts have refused to apply the new rule where the cause of action relied upon in the amendment

[18] Sec. 1, 48 Stat. 1064 (28 U. S. C. A. Sec. 723 b).

is different from that originally asserted *although it arises out of the transaction set forth in the original pleading.*" Hughes Federal Practice, Vol. 17, p. 521, § 20901. And when the amendment is not filed until after limitation would have been effective as to it as an original claim, then the amendment will not relate back. Quoting further from the above § 20901: "But this rule (relation back of amendments), from its very reason has been held to apply only to an amendment which does not create a new cause of action. The principle has been said to be that, as running of the statute is interrupted, by the suit and summons, *so far as the cause of action then propounded is concerned,* it interrupts as to all matters subsequently alleged, by way of amendment, which are *part* thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted it is said *the reason for the rule ceases to exist,* and hence the rule itself no longer applies and the *new cause* is barred." (emphasis supplied). See *Union Pacific R. Co.* v. *Wyler,* 158 U. S. 285, citing *Crofford* v. *Cothran,* 2 Sneed. (34 Tenn.) 492 as holding that "an action in assumpsit was changed by amendment into an action of debt; the conclusion was that the amendment was a new cause of action." That (Crofford) case, which is exactly the case at bar, reasoned soundly that although an *extremely liberal* rule was applied, "still it must be confined within some *reasonable and sensible* limits. We are not to suppose that the legislature, in providing a method whereby one party might be relieved, in some degree, against the consequences of his own ignorance or negligence, intended to deprive the other party of the benefit of any legal defense, the right to which had become *perfect and absolute* before the time of the application for such amendment." It continues: "This *fiction* of relation (back of amendments), cannot be allowed to obtain where it would work injustice to the adversary

party, by destroying or taking from him the benefit of an existing *legal defense* to the action" (emphasis supplied).

Bleckley, C. J., Georgia's immortal and most quoted Chief Justice held in *Ayers* v. *Daly*, 56 Ga. 120 (1) that a bill for an account cannot be turned by amendment into an action for breach of warranty under a contract, "more especially if at the time of making the amendment, a separate action on the warranty would have been barred by the statute of limitation. * * * The defendant's agreement to invest came out in the amendment, but was not alleged in the original bill." The original action there was for money had and received and the court refused to permit this action on an implied contract to be changed to one on an express contract.

Similarly Judge Bleckley held in *Palmer* v. *Southern Express Co.*, 52 Ga. 240, 241 that in a tort action a distinct action on tort could be joined, but "that if the new cause was not added—sued upon—until after the four years, it is barred."

In *Parmelee* v. *Savannah &c Ry.*, 78 Ga. 239 (1) (2 S. E. 686) although arising out of the identical facts, a statutory cause of action was not permitted to be amended to set up a common law count.

In *Graham* v. *Jones*, 39 Ga. App. 610 (147 S. E. 902) it was held that where the case was laid upon the theory of an *express* promise, evidence of an *implied* promise would not sustain a verdict, citing other Georgia cases. The identical principle was there involved as here, the only difference being that the theories were reversed here, the original claim being an implied promise and the amendment alleging an express promise.

An amendment setting up a statutory liability in an action on a common law liability, states a new cause of action. *Charleston & W. C. Ry. Co.* v. *Miller*, 113 Ga. 15 (1) (38 S. E. 338).

"An action upon a contract for the price of goods sold and delivered cannot by amendment be converted into a suit for money had and received to the plaintiff's use." *Groover* v. *Tattnall Supply Co.*, 10 Ga. App. 679 (73 S. E. 1083).

Where in a suit in ejectment for land an amendment is "filed which lays an entirely new demise, such an amendment, relatively to the statute of limitations, does not relate back to the date of the filing of the original petition, but should be tried as of the date of the filing of the amendment." *Bentley* v. *Crummey & Hamilton*, 119 Ga. 911 (3) (47 S. E. 209); *Burbage* v. *Fitzgerald*, 98 Ga. 582 (2) (25 S. E. 554).

Tests for Determining Identity of Causes of Action

Numerous cases have laid down tests to determine if a new cause of action is alleged, among them:

1. Would the same evidence support both pleadings? Obviously not. One was supported by paid checks. The other by letters calling for payment of certain profits and to pay larger rates of interest and extras, plus a guaranteed exchange rate. Evidence of the former would not support the latter.

2. Is the measure of damages the same in each case? Under the original petition only $14,800 plus 6% interest by operation of law could have been recovered. Under the amendment provision was made for the payment of 20% *profit* in one letter and 7½% interest plus 2½% extra, plus maintenance of 2.50 exchange in the other. Even though the excess over 6% provided by the letters be properly held to be usury and forfeited under New Jersey law, still the measure is clearly not the same in either event.

3. Are the allegations of each, subject to the same defenses? No argument is necessary to show that they are not. Payment of profit establishes an investment and unless Barthel had failed to make the agreed investment there would be no liability against him. The question of usury, too, brought out by the amendment, could not be asserted against an implied promise to pay legal interest.

Placing the two causes of action in juxtaposition makes their difference clearly and instantly apparent.

Original Cause of Action	Amendment
Assumpsit, implied contract	Express contract in writing.
Checks dated Nov. 30, 1934 April 24, 1935	Letters dated Nov. 28, 1934 Apr. 20, 1935
Evidenced by paid checks, as receipts for money.	Evidenced by written letters.
Interest at legal rate of 6%.	Nov. 28 letter, interest at 7½% payable semi-annually, with 2½% extra.
	April 20 letter, 20% profit.
Maturity, immediately.	Nov. 28 letter callable December and March.
	April 20 letter due in two or three months.
Security, none.	Letter of April 20, secured by stock interest.

Internal evidence of plaintiff's intention to treat the amendment as involving a new cause of action is contained in plaintiff's motion for judgment made after the filing of the amendment (R. 17) in which judgment is asked on the amendment because it was not denied (which denial was not required) and interest is asked on the Ten Thousand Dollar claim at 7% whereas the original suit asked for only 6%. Plaintiff obviously regarded them as different claims.

Clerk's Certificate of Citizenship Insufficient

A certificate of a clerk reciting that the applicant had been admitted to citizenship, but failing to show any extract from the record, or minute of the action of the court, is not competent to show naturalization. *Charles Green's Son* v. *Salas* (CC Ga.), 31 Fed. 106 (4), citing as precisely in point, *Miller* v. *Reinhart*, 18 Ga. 239. Naturalization can be proved only by the record of the judgment. *Green* v. *Salas*, *supra*. Clerks of Federal courts have no power to certify an admission to citizenship, which is a judgment provable by the original record. *U. S.* v. *Makins*, 26 Fed. Cas. 1144.

The *Green* and *Miller* cases, *supra*, were pronounced to be unquestionably sound in *Dolan* v. *United States* (C. C. A. 8th), 133 Fed. 440, 449, in which the Court said: "A court can speak only by its records, and a clerk of the court ought only to speak by a copy of such records. He ought not to attempt to declare his interpretation of their legal effect. * * * There is no statute authorizing clerks of court to issue certificates of citizenship in any form. * * * It has been held that a certificate issued by the clerk which does not purport to be a transcript of the record is not proper evidence of naturalization. (Citing the *Green* and *Miller* cases, *supra*). These cases are unquestionably sound, for the clerk has no authority to certify the legal effect of his records, but can only speak by a transcript thereof. It has been repeatedly held that the proceeding whereby an alien is admitted to citizenship is a judicial proceeding and that the order admitting him is a judgment. *Spratt* v. *Spratt*, 4 Pet. 393; *Stark* v. *Chesapeake Inc. Co.*, 7 Cranch. 430; *U. S.* v. *Gleason* (CC), 78 Fed. 396."

Such was the certificate here (R. 46, 47), and this constituted the only evidence of diverse citizenship of the plaintiff.

Surviving Party Is Not Incompetent to Testify as to Matters Concerning Which He Has Been Examined

The identical situation here presented was decided in *Shipp* v. *Davis*, 78 Ga. 201 (1, 2) (2 S. E. 549) where the surviving party was examined on cross-examination by the representative of the deceased opposite party, and was therefore held "competent to go on and explain (to the same extent that a disinterested witness might do) the circumstances under which the" note testified about on cross-examination, "was executed and delivered." See also *Lydia Pinkham Medicine Co.* v. *Gibbs*, 108 Ga. 138 (2) (33 S. E. 945).

Defendant's Motion for Judgment Made Before Amendment Should Have Been Sustained

Defendant's motion for judgment on the pleadings under his plea of the statute of limitations to the suit as originally filed and before amendment was overruled on the theory, as shown by the order, that no demand for payment had been shown to start the running of the statute of limitations. No demand is necessary to start the statute running in a suit on an implied *assumpsit*, but on the contrary it starts running immediately. *Teasley* v. *Bradley*, 110 Ga. 497 (3), 504, 505 (35 S. E. 782, 78 Am. St. Rep. 113).

This case involves interesting and important questions which need clarification, having been decided differently by different Circuit Courts of Appeal, both on the all important question of relation back of amendments and on the jurisdictional question of evidence of citizenship.

Unless the writ of certiorari is granted the decision of the Fifth Circuit Court of Appeals will create great confusion in the law as it has been construed by other Circuit Courts of Appeals prior thereto, and by the highest ap-

pellate courts of Georgia, and will, contrary to the inhibition of the enabling act, abridge substantive rights of defendants.

Respectfully submitted,

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